ECHOSTAR ORIGINAL

ECHOSTAR COMMUNICATIONS CORPORATION

November 19, 2002

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FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY

Marlene H Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20054

Re: **<u>Ex Parte Notice</u> – 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244**

Dear Ms. Dortch:

At the request of Ken Ferree, Chief of the Media Bureau, and Paul Gallant, Chair. Media Ownership Working Group, Echostar Communications Corp. (EchoStar) hereby submits for the record in the above-captioned proceeding information regarding "Most Favored Nation" (MFN) clauses in our distribution agreements with programmers.

In general. about 60% of our programming agreements include MFN clauses with respect to price (monthly fee per subscriber), While not true for much of EchoStar's history, most of the MPN clauses in recently entered programming agreements (roughly 90%) are technology neutral, meaning that they apply to the programmers' distribution agreements with all multichannel video programming distributors (MVPDs), not just Direct Broadcast Satellite (DBS) providers.

The Commission should note that even where MFN clauses are in effect, programmers usually are able to avoid offering EchoStar the best rate offered to another MVPD. The vast majority of MFN clauses include an exception for volume-based discounts. This allows programmers to lower their rates for the largest MVPDs. despite the presence of MFN clauses in agreements with other MVPDs. This issue typically is a matter of great concern to EchoStar during distribution negotiations with programmers, given that EchoStar's subscribership is considerably smaller than that of the largest cable MSOs.

Moreover, volume based exceptions to MFN clauses tend to be structured in stair-step fashion. rather than on a sliding scale. To illustrate with a hypothetical example, a programmer

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that allows for volume-based discounts would agree to charge a rate of $1 per subscriber to a MVPD with 0 to 100,000 subscribers. and $0.50 per subscriber to a MVPD with 100.001 to 500,000 subscribers. The MVPD with 99,000 subscribers, therefore, would pay twice as much per subscriber as the MVPD with only 2,000 more subscribers. EchoStar believes that, due to this volume discount structure. it tends to pay more per subscriber than do the largest cable MSOs, even where the relative difference in subscribership between EchoStar and the MSO is not great.[1]

Finally. programmers subject to MFN clauses may be able *to* favor particular MVPDs with benefits apart from volume based fee reductions. For example, a programmer might pay a MVPD a premium for favorable channel positioning or for marketing and launch support.

EchoStar hopes that the Bureau finds this information helpful and responsive. If you would like more detail or additional information, please do not hesitate to contact me at (202) 293-0981

Sincerely,

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[1] As EchoStar has pointed out previously to the Commission. programming executives are on record acknowledging that they charge satellite providers more than they charge cable operators for the same programming. For example, in 2001, Sumner Redstone, the CEO of Viacom, was interviewed by the Los Angeles Times. in which he noted: "[W]hat a lot of people don't know is that satellite broadcasters pay us more for the same programming than cable operators." 2001 WL 28929748 (November 18,2001).

## CERTIFICATE OF SERVICE

I, Gregory Noll, hereby certify that on this 19th day of November, 2002. copies of the foregoing were served by first class United States mail, postage prepaid, on the following:

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